Filed 11/4/19 In re Jones CA4/2

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| In re DENO ANTHONY JONES, | E072147 |
| on Habeas Corpus, | (Super.Ct.Nos. HEF001922) |
| | OPINION |

ORIGINAL PROCEEDINGS; petition for habeas corpus. Rodney L. Walker, Judge. Petition granted.

Deno Anthony Jones, in pro. per.; James M. Crawford, under appointment by the Court of Appeal, for Petitioner.

Xavier Becerra, Attorney General, Phillip J. Lindsay, Assistant Attorney General, and Amanda J. Murray and Gregory J. Marcot, Deputy Attorneys General, for Respondent.

## I. INTRODUCTION

Petitioner, Deno Anthony Jones, is currently serving 25 years to life in state prison for his 1999 guilty plea and resulting conviction for failing to register as a sex offender

(Pen. Code, former § 290, subd. (g)(2)), together with his admission, as part of his guilty plea, that he had four prior strike convictions (Pen. Code, §§ 667, subds. (c), (e), 1170.12, subd. (c)). (See *People v. Jones* (Feb. 21, 2001, E027284) [nonpub. opn.] [at pp. 1-2] [affirming Jones's 1999 judgment of conviction].)[1]

Jones has petitioned this court for a writ of habeas corpus, claiming the California Department of Corrections and Rehabilitation (the CDCR) has wrongfully denied and will continue to wrongfully deny him early parole consideration under regulations the CDCR adopted pursuant to Proposition 57, a 2016 voter-approved initiative measure which requires state prisoners convicted of "a nonviolent felony offense" to be considered for parole as soon as they have completed the "full term" for their "primary offense." (Cal. Const., art. I, § 32; see *In re Gadlin* (2019) 31 Cal.App.5th 784, 786, 788, review granted May 15, 2019, S254599 (*Gadlin*).)

We grant the petition and direct the CDCR to deem Jones eligible for early parole consideration under Proposition 57, within 60 days of the date the remittitur issues.

## II. FACTS AND PROCEDURAL BACKGROUND

On November 8, 2016, the California electorate approved Proposition 57, which, effective the next day, amended the California Constitution to provide: "Any person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense." (Cal.

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[1] Jones's prior strike convictions include a prior conviction for forcible rape. (See *People v. Jones* (Sept. 15, 2015, E063317) [nonpub. opn.] [at pp. 5-6] [denying Jones's petition to recall his indeterminate "Three Strikes" sentence and resentence him under Prop. 36, because his forcible rape conviction rendered him ineligible].)

Const., art. 1, § 32, subd. (a)(1).) For purposes of this provision, "the full term for the primary offense means the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence." (*Id*., subd. (a)(1)(A).) The CDCR was "directed" to "adopt regulations in furtherance of these provisions" and the Secretary of the CDCR was directed to "certify that [the] regulations protect and enhance public safety." (*Id*., subd. (b).)

On February 15, 2019, Jones filed an original petition for writ of habeas corpus in this court, claiming he is entitled to early parole consideration under the plain language of Proposition 57 and article 1, section 32 of the California Constitution.[2] Jones claims he has been eligible for early parole consideration since Proposition 57 was enacted effective November 9, 2016, but the CDCR has wrongfully excluded and will continue to wrongfully exclude him from early parole consideration under Proposition 57 pursuant to regulations the CDCR adopted effective January 1, 2019.[3]

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[2] Jones titled his filing "motion for injunction and temporary restraining order," but we have deemed the filing a petition for a writ of habeas corpus.

[3] Notwithstanding Jones's prior strike conviction for at least one registrable sex offense, the Attorney General (AG) concedes that Jones is otherwise eligible for early parole consideration under Proposition 57. Indeed, Jones's Penal Code section 290 offense is a "nonviolent felony offense" (Cal. Const., art. 1, § 32, subd. (a)) because it is not listed as a "violent felony" in Penal Code section 667.5, subdivision (c) (Cal. Code Regs., tit. 15, § 3495, subd. (b)). Jones's "Three Strikes" sentence is an "alternative sentence" (Cal. Const., art. 1, § 32, subd. (a)(1)(A)) because it is not based solely on his current offense (*People v. Turner* (2005) 134 Cal.App.4th 1591, 1597). And, had Jones been sentenced solely on his current offense in 1999, he would have been sentenced to 16 months, two years, or three years. (Pen. Code, former § 290, subd. (g)(2).) Thus, three years is the "full term" for Jones's current and "primary offense" (Cal. Const., art. 1, § 32, subd. (a)(1)(A)), and he has served this "full term."

We asked, and the AG filed, an informal letter response to the petition on June 21, 2019, and Jones filed a reply on July 2, 2019. We denied the AG's request to hold these writ proceedings in abeyance pending the Supreme Court's completion of its review in *Gadlin*. On July 11, 2019, we issued an order to show cause before this court why the relief prayed for in the petition should not be granted. Counsel was then appointed for Jones. On September 4, 2019, the AG filed a return to the order to show cause, and on September 10, 2019, counsel for Jones filed a traverse.

## III. DISCUSSION

We begin by noting that Jones's writ petition is moot to the extent it may be construed as claiming the CDCR is barring Jones from early parole consideration under Proposition 57 on the ground he is serving an indeterminate Three Strikes sentence. Effective January 1, 2019, the CDCR adopted emergency regulations to comply with the Court of Appeal's decision in *In re Edwards* (2018) 26 Cal.App.5th 1181, 1192-1193, and these regulations became final in May 2019. The *Edwards* court invalidated the CDCR's prior regulations, which barred from early parole consideration any inmate serving an indeterminate Three Strikes sentence for a nonviolent offense, as inconsistent with the language of Proposition 57 and article 1, section 32 of the California Constitution. (*In re Edwards*, *supra*, at pp. 1192-1193; see *Gadlin*, *supra*, 31 Cal.App.5th at p. 787.) Under the new regulations, Jones cannot be barred from early parole consideration on the ground he is currently serving an indeterminate sentence under the Three Strikes law.

But the CDCR's regulations continue to exclude from early parole consideration under Proposition 57, any "'indeterminately-sentenced nonviolent offender'" who "*is convicted of a sexual offense* that currently requires or will require registration as a sex offender under the Sex Offender Registration Act, codified in sections 290 through 290.024 of the Penal Code." (Cal. Code Regs., tit. 15, §§ 3495, 3496, subds. (a), (b), italics added.)[4] The CDCR is interpreting this regulation, and its parallel regulations for determinately-sentenced nonviolent offenders,[5] as barring early parole consideration under Proposition 57 for any inmate who has *any prior conviction* for an offense that requires registration as a sex offender (a registrable sex offense), even if the inmate has served his term for the prior registrable sex offense and is currently serving a term for "a nonviolent felony offense" that is not a registrable sex offense.

The question presented by Jones's petition is whether the CDCR is exceeding the scope of its authority under Proposition 57 in interpreting the disputed regulation to bar inmates with a prior conviction for a registrable sex offense from early parole consideration under Proposition 57. The *Gadlin* court held that this interpretation is inconsistent with the language of article 1, section 32 of the California Constitution. (*Gadlin, supra,* 31 Cal.App.5th at pp. 789-790.) We find *Gadlin*'s reasoning persuasive and agree with its conclusion.

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[4] An identical regulation, section 3491, subdivision (b)(3) of title 15 of the California Code of Regulations, applies to "'determinately-sentenced nonviolent offenders.'" (Cal. Code Regs., tit. 15, § 3490, 3491.)

[5] See footnote 3, *ante*.

As the *Gadlin* court pointed out, the language of article I, section 32, subdivision (a)(1) of the California Constitution "make[s] clear that early parole eligibility must be assessed based on the conviction for which an inmate is now serving a state prison sentence (the current offense), rather than prior criminal history. This interpretation is supported by section 32, subdivision (a)(1)'s use of the singular form in 'felony offense,' 'primary offense,' and 'term.'" (*Gadlin, supra,* 31 Cal.App.5th at p. 789.)

Jones's current offense is his failure to register as a sex offender, a violation of Penal Code section 290. In its final statement of reasons accompanying the disputed regulations, the CDCR noted that "sex offenses demonstrate a sufficient degree of violence and represent an unreasonable risk to public safety to require that sex offenders be excluded from nonviolent parole consideration." (CDCR, Credit Earning and Parole Consideration Final Statement of Reasons (Apr. 30, 2018) p. 20.) But as the *Gadlin* court explained: "These policy considerations . . . do not trump the plain text of section 32, subdivision (a)(1)." (*Gadlin, supra,* 31 Cal.App.5th at p. 789.) Indeed, "[i]n order for a regulation to be valid, it must be (1) consistent with and not in conflict with the enabling statute and (2) reasonably necessary to effectuate the purpose of the statute. (Gov. Code, § 11342.2.)" (*Physicians & Surgeons Laboratories, Inc. v. Department of Health Services* (1992) 6 Cal.App.4th 968, 982.) That is, "the rulingmaking authority of the

agency is circumscribed by the substantive provisions of the law governing the agency." (*Henning v. Division of Occupational Saf. & Health* (1990) 219 Cal.App.3d 747, 757.)[6]

Thus here, as in *Gadlin*, the CDCR's application of section 3496, subdivision (b), or section 3491, subdivision (b)(3), of title 15 of the California Code of Regulations, to inmates who, like Jones, are not currently serving a term for a registrable sex offense, but who are instead serving a term for a nonviolent felony offense and who have already served the "full term" for that offense, violates the plain language of article 1, section 32 of the California Constitution. Such inmates are eligible for early parole consideration under Proposition 57.[7]

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[6] As the *Gadlin* court also noted: "'"'The task of the reviewing court in such a case is to decide whether the [agency] reasonably interpreted [its] legislative mandate. . . . Such a limited scope of review constitutes no judicial interference with the administrative discretion in that aspect of the rulemaking function which requires a high degree of technical skill and expertise. . . . [T]here is no agency discretion to promulgate a regulation which is inconsistent with the governing statute. . . . Whatever the force of administrative construction . . . final responsibility for the interpretation of the law rests with the courts. . . . Administrative regulations that alter or amend the statute or enlarge or impair its scope are void . . . .' [Citation.]" (*Id*. at pp. 757-758.)' ([*In re*] *Edwards*, *supra*, 26 Cal.App.5th at p. 1189)." (*Gadlin*, *supra*, 31 Cal.App.5th at pp. 788-789.)

[7] We express no opinion whether the CDCR's interpretation and application of its regulations to exclude early parole consideration for inmates whose primary or current offense is a registrable sex offense also violates Proposition 57. Additionally, Proposition 57 does not authorize Jones's release, only his early parole consideration, and the Board of Prison Hearings may consider Jones's full criminal history in deciding whether to grant him parole. (Pen. Code, § 3041, subd. (b); Cal. Code Regs., tit. 15, § 2449.32, subd. (c); *Gadlin*, *supra*, 31 Cal.App.5th at p. 790, fn. 3.)

## IV. DISPOSITION

Jones's petition for a writ of habeas corpus is granted. The CDCR is directed to consider Jones for early parole under Proposition 57 within 60 days of the remittitur issuance.

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FIELDS
J.

We concur:

McKINSTER
Acting P. J.

MILLER
J.